



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

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STATE WATER CONTROL BOARD ENFORCEMENT ACTION - ORDER BY CONSENT ISSUED TO MATTHEW MILLER FOR 1124 KATHLEEN LANE, CHESAPEAKE, VA Unpermitted Activity

SECTION A: Purpose

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and Matthew Miller, regarding the 1124 Kathleen Lane property, for the purpose of resolving certain violations of State Water Control Law and the applicable regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
2. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
3. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
4. "Discharge" means, when used without qualification, a discharge of a pollutant, or any addition of a pollutant or combination of pollutants, to state waters or waters of the contiguous zone or ocean other than a discharge from a vessel or other floating craft when being used as a means of transportation.

5. "Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.
6. "Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil, or rock.
7. "Fill" means replacing portions of surface water with upland, or changing the bottom elevation of surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris. 9 VAC 25-210-10.
8. "Fill Material" means any pollutant which replaces portions of surface water with dry land or which changes the bottom elevation of a surface water for any purpose. 9 VAC 25-210-10.
9. "Matthew Miller" means Mr. Matthew Miller, currently a resident of the City of Chesapeake, Virginia. Matthew Miller is a "person" within the meaning of Va. § 62.1-44.3.
10. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
11. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
12. "Permit" or "Virginia Water Protection Permit" means an individual or general permit issued under Va. Code § 62.1-44.15:20 that authorizes activities otherwise unlawful under Va. Code § 62.1-44.5 or otherwise serves as the Commonwealth's certification under § 401 of the federal Clean Water Act (33 United States Code ("USC") § 1344.
13. "Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. 9 VAC 25-210-10.
14. "Pollution" means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters: (i) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (b) the discharge of untreated sewage by any owner into state waters; and (c)

contributing to the contravention of standards of water quality duly established by the board, are "pollution." Va. Code § 62.1-44.3; 9 VAC 25-210-10.

15. "Property", "Parcel" or "Site" means the tract of land at 1124 Kathleen Lane, in Chesapeake, Virginia, owned by Matthew Miller.
16. "TRO" means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia.
17. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*
18. "Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions. 9 VAC 25-210-10.
19. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 2.2 (Va. Code §§ 62.1-44.15:20 through 62.1-44.15:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.
20. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3 and 9 VAC 25-210-10.
21. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
22. "USACE" means the United States Army Corps of Engineers.
23. "Va. Code" means the Code of Virginia (1950), as amended.
24. "VAC" means the Virginia Administrative Code.
25. "VWP" means Virginia Water Protection Permit as defined in 9 VAC 25-210-10.
26. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 9 VAC 25-210-10.

SECTION C: Findings of Fact and Conclusions of Law

1. Matthew Miller owns the Property. The Property contains uplands as well as forested nontidal wetlands which are surface waters of the Commonwealth.
2. On June 23, 2015, DEQ staff conducted a site visit at the Property where the USACE had issued a Cease and Desist letter to Matthew Miller following complaints of mechanized clearing of wetlands on the Property.
3. During this site visit, Department staff inspected the Property for compliance with the requirements of the State Water Control Law and the Regulations. The DEQ inspector observed:
 - a. 8.3 acres of nontidal forested wetlands had been mechanically cleared of all vegetation, and the majority of the cleared area had been grubbed, with stumps and tree roots removed.
 - b. 0.36 acres of nontidal forested wetlands, at the property but not contiguous with the 8.3 acres impacted, had been covered with fill material.
 - c. 0.7 acres of the 0.36 acres of forested wetlands listed in C(3)(b) had been permanently cleared, filled and converted into an impermeable road.
 - d. A review of DEQ files indicated that Matthew Miller does not have a Permit for the above activities listed in C(3)(a), C(3)(b), and C(3)(c) above.
4. Va. Code § 62.1-44.15:20 states that except in compliance with VWP permit, it is unlawful to excavate in a wetland, or conduct the following activities in a wetland: (b) filling or dumping... (d) new activities that cause significant alteration or degradation of existing wetland acreage or functions. Similarly, 9 VAC 25-210-50(A) states that except in compliance with a permit, no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters, or otherwise alter the physical, chemical, or biological properties of surface waters, including wetlands.
5. Va. Code § 62.1-44.5 states that except in compliance with a certificate or permit issued by the Board or other entity authorized by the Board to issue a certificate or permit pursuant to this chapter, it shall be unlawful for any person to... 2) excavate in a wetland; 3) otherwise alter the physical, chemical or biological properties of state waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses.
6. On August 27, 2015, a USACE Jurisdictional Determination (JD) was issued for the Property. The JD stated that in one portion of the property, 8.3 acres of wetlands were impacted, and an additional noncontiguous 0.36 acres of wetlands had been filled (the 0.36 acres included the 0.07 acres of filled impermeable road listed in C(3)(c) above).
7. On September 30, 2015, DEQ and USACE staff conducted a site visit at the Property with Mr. Miller. Staff observed that the cleared wetland areas were beginning to naturally restore and that additional restoration work, for the 8.3 acres and 0.29 acres, was not

needed at that time due to the natural seed bank and woody growth and diversity present in the impacted areas, except for the 0.07 acres of filled impermeable road.

8. During the September 30, 2015 meeting at the property, Mr. Miller agreed to purchase 0.14 compensatory wetland mitigation credits for the 0.07 acres of forested wetlands that had been cleared, filled and converted into an impermeable road from a USACE approved wetland bank.
9. On November 2, 2015, DEQ issued NOV No. TR15-1101, to Matthew Miller for unpermitted impacts to a total of 8.66 acres of nontidal wetlands.
10. On November 2, 2015, DEQ staff met with Matthew Miller and his associates at the Tidewater Regional Office to discuss the NOV.
11. On November 9, 2015, documentation was received from the USACE approved wetland bank, The Great Dismal Swamp Restoration Bank, LLC, indicating the purchase of 0.14 wetlands credits by Matthew Miller at a 2:1 compensation ratio for the 0.07 acres of wetlands that had been permanently cleared, filled and converted into an impermeable road.
12. On June 17, 2016, DEQ staff met with the consultant for Matthew Miller at the Property. During the site visit, staff observed that no additional impacts have been taken in the 8.59 acres of non-tidal forested wetlands that had previously been cleared and grubbed. Staff observed that the cleared wetland areas were continuing to restore, and, in concurrence with the USACE observation during the September 30, 2015, site visit, observed that no additional restoration work was necessary to restore the 8.59 acre impacted area (8.3 acres + 0.36 acres – 0.07 acres compensated by the purchase of wetland credits), as the cleared wetland areas were continuing to naturally restore.
13. Based on the results of June 23, 2015, and September 30, 2015, site visits, and the November 2, 2015, meeting, the Board concludes that Matthew Miller has violated Va. Code §§ 62.1-44.15:20, 62.1-44.15:20 and 9 VAC 25-210-50(A), as described in paragraphs C(3) – C(12), above.
14. Based on the June 17, 2016, site visit, and documentation received as described in C(11) above, the Board concludes that the violations as described in C(3) – C(12), above, have been corrected.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders Matthew Miller, and Matthew Miller agrees to:

1. Pay a civil charge of \$28,936.50 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

Matthew Miller shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If the Department has to refer collection of moneys due under this Order to the Department of Law, Matthew Miller shall be liable for attorneys' fees of 30% of the amount outstanding.

SECTION D: Agreement and Order

1. The Board may modify, rewrite, or amend this Order with the consent of Matthew Miller for good cause shown by Matthew Miller, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order and in NOV No. TR15-110, dated November 2, 2015. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, Matthew Miller admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. Matthew Miller consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. Matthew Miller declares he has received fair and due process under the Administrative Process Act and the State Water Control Law and he waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
6. Failure by Matthew Miller to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the

Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.

7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. Matthew Miller shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. Matthew Miller shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Matthew Miller shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
 - a. the reasons for the delay or noncompliance;
 - b. the projected duration of any such delay or noncompliance;
 - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
 - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.


Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

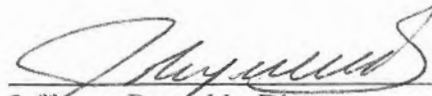
9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and Matthew Miller. Nevertheless, Matthew Miller agrees to be bound by any compliance date which precedes the effective date of this Order.
11. This Order shall continue in effect until:
 - a. The Director or his designee terminates the Order after Matthew Miller has completed all of the requirements of the Order;
 - b. Matthew Miller petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or

- c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to Matthew Miller.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Matthew Miller from his obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules or specifications attached hereto or submitted by Matthew Miller and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
13. Any documents to be submitted pursuant to this Order shall be submitted by Matthew Miller or an authorized representative of Matthew Miller.
14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.
15. By its signature below, Matthew Miller voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 10th day of February, 2016. 



Jefferson Reynolds, Director
Division of Enforcement
Department of Environmental Quality

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Matthew Miller voluntarily agrees to the issuance of this Order.

Date: 12-5-16 By: [Signature], OWNER
(Person) (Title)
Matthew Miller

Commonwealth of Virginia
City/County of VA Beach

The foregoing document was signed and acknowledged before me this 5th day of
Dec, 2016, by Matthew Miller in his personal
capacity.

[Signature]
Notary Public

7208059
Registration No.

My commission expires: 2/29/20

Notary seal:

